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10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION

14 FACEBOOK, INC.,

Case No. 5:08-cv-05780 JW

15 Plaintiff,

**FACEBOOK, INC.'S CORRECTED
NOTICE OF MOTION AND MOTION
FOR PARTIAL SUMMARY
JUDGMENT ON COUNT 1;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
THEREOF**

16 v.

17 POWER VENTURES, INC., a Cayman Island
corporation; STEVE VACHANI, an individual;
18 DOE 1, d/b/a POWER.COM, DOES 2-25,
inclusive,

Date: December 19, 2011
Time: 9:00 A.M.
Dept: Courtroom 9, 19th Floor
Judge: Honorable James Ware

19 Defendants.

22 **CONFIDENTIAL – FILED UNDER SEAL**

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CORRECTED MOTION FOR PARTIAL SUMMARY
JUDGMENT
CASE NO. 5:08-cv-05780 JW

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1 **NOTICE OF MOTION AND MOTION**

2 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

3 PLEASE TAKE NOTICE that on December 19, 2011 at 9:00 A.M. or as soon thereafter as
4 the matter may be heard, in the courtroom of the Honorable James Ware, United States District
5 Court, 450 Golden Gate Avenue, San Francisco, California 94102, Facebook, Inc. will move the
6 Court for Partial Summary Judgment on Facebook's First Count against Defendants Power
7 Ventures, Inc. and Steven Vachani, under the CAN-SPAM Act (15 U.S.C. Section 7704 *et seq.*).
8 This motion is based on the Notice of Motion and Motion, the supporting Memorandum of Points
9 and Authorities, the declarations filed in support thereof, all pleadings on file in this action, oral
10 argument of counsel, and any other matter that may be submitted at the hearing.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Facebook, Inc. (“Facebook”) requests that this Court find defendants Power Ventures and
4 Steve Vachani (collectively, “Defendants”) liable for violating the CAN-SPAM Act in the
5 amount of [REDACTED]. The following facts regarding Defendants’ liability are beyond dispute:

- 6 1. Defendants drafted commercial messages to send through Facebook.
- 7 2. Defendants harvested their users’ “friends” lists from Facebook through
automated computer scripts.
- 8 3. Defendants sent the commercial messages through their users’ accounts to the
users’ Facebook friends.
- 9 4. Defendants did not disclose that they initiated the transmission of these
messages.
- 10 5. Defendants paid their users if their Facebook friends joined the Power website.
By Defendants’ estimates, it paid 30-40 users.
- 11 6. Defendants sent at least [REDACTED] messages to Facebook users. Defendants
destroyed the files with the actual logs of the total numbers after this lawsuit
was filed.
- 12 7. Facebook dedicated considerable resources to combat Defendants’ spam
attacks.

13 Under these undisputed facts, partial summary judgment finding Defendants liable in the
14 amount of [REDACTED]
15 [REDACTED].

16 **II. RELEVANT FACTS**

17 A. Facebook

18 [REDACTED]
19 [REDACTED] Declaration of Ryan McGeehan in Support of Facebook’s Motion for
20 Partial Summary Judgment (“McGeehan Decl.”), ¶ 2. In 2008, Facebook had roughly 132
21 million monthly active users. *Id.*; *see also* Declaration of Monte Cooper in Support of
22 Facebook’s Motion for Partial Summary Judgment (“Cooper Decl.”) Ex. 1. [REDACTED]
23 [REDACTED]
24 [REDACTED]

1 [REDACTED] McGeehan Decl. ¶ 3. [REDACTED]
2 [REDACTED] *Id.* [REDACTED]
3 [REDACTED] *Id.* [REDACTED]
4 [REDACTED] *Id.* [REDACTED]
5 [REDACTED]
6 [REDACTED] *Id.*

7 B. Facebook protects its user experience by combating spam.

8 [REDACTED] McGeehan Decl. ¶ 4.
9 [REDACTED]
10 [REDACTED]. *Id.* [REDACTED]
11 [REDACTED]. *Id.* [REDACTED]
12 [REDACTED]
13 [REDACTED] *Id.* [REDACTED]
14 [REDACTED]. *Id.*, ¶ 5. [REDACTED]
15 [REDACTED]
16 [REDACTED] *Id.* [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED] *Id.*, ¶ 4.
20 [REDACTED]
21 [REDACTED]. *Id.*, ¶¶ 6a-6d. [REDACTED]
22 [REDACTED] *Id.*, ¶ 6a. [REDACTED]
23 [REDACTED]
24 [REDACTED] *Id.* [REDACTED]
25 [REDACTED]
26 [REDACTED] *Id.*
27 [REDACTED]
28 [REDACTED]. *Id.*, ¶ 6b. [REDACTED]

1 [REDACTED]
 2 [REDACTED] . *Id.* [REDACTED] *Id.*
 3 [REDACTED] *Id.*, ¶ 6c.
 4 [REDACTED]
 5 [REDACTED] *Id.* [REDACTED]
 6 [REDACTED] *Id.* T [REDACTED]
 7 [REDACTED] *Id.*, & Ex. 1
 8 Facebook also uses legal measures to protect its user experience. [REDACTED]
 9 [REDACTED]
 10 [REDACTED] . *Id.*, ¶ 6d. [REDACTED]
 11 [REDACTED]
 12 [REDACTED]
 13 [REDACTED]
 14 [REDACTED] *Id.*, ¶ 6d. [REDACTED]
 15 [REDACTED]
 16 *Id.*, ¶ 6b.

17 **C. Power Ventures and Steve Vachani**

18 From 2008 through 2010 Defendants operated a website located at www.power.com.
 19 Cooper Decl. Ex. 2 at 21:15-23. [REDACTED]
 20 [REDACTED]
 21 [REDACTED] Cooper Decl. Exs. 3 and 4; Dkt. No. 54 ¶¶ 18, 41, 45, 50. During
 22 all relevant times, Vachani was the Chief Executive Officer of Power Ventures, and is the
 23 architect of the technology and marketing schemes at issue in this case. *Id.* at Ex 2 at 15:18-24;
 24 181:21-183:9; Ex 5 at Response to Interrogatory Nos. 8-10, 16.

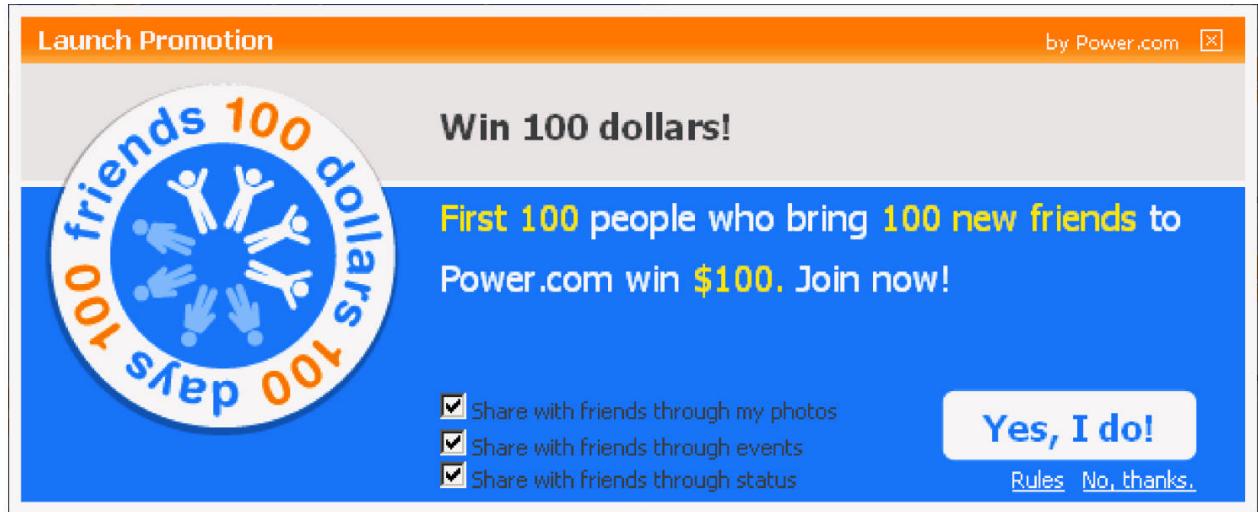
25 **D. Defendants' Unlawful Actions to Send Spam to Facebook Users**

26 Defendants sought to grow the Power.com user base on Facebook's back. They designed
 27 a scheme to harvest user information (including friends' lists), gain access to Facebook users'
 28 accounts and then access those accounts to send promotional commercial messaging through

1 Facebook's systems. Defendants studied Facebook's terms, ignored the authorized approach that
 2 millions of website operators use to integrate with Facebook, and improperly accessed Facebook
 3 users' accounts to promote their commercial service. Cooper Decl. Ex. 2 at 276:7-13; 286:14-21;
 4 290:15-291:1.

5 [REDACTED]
 6 [REDACTED]
 7 [REDACTED] Cooper Decl. Ex. 2 at 181:21-186:2;
 8 205:12-206:22; 207:9-208:14; 205:9-15; Ex. 6 at Responses to Requests for Admissions Nos. 42-
 9 44, 50; Declaration of Larry Melling in Support of Facebook's Motion for Partial Summary
 10 Judgment ("Melling Decl.") ¶¶ 3, 17-23. [REDACTED]

11 [REDACTED]
 12 [REDACTED]¹ shown below:



23 Cooper Decl. Ex. 7; Melling Decl. ¶¶ 3, 21-23. [REDACTED]
 24 [REDACTED]

25 [REDACTED] Melling Decl. ¶¶ 21-23. Users were never told, for example, that Power would harvest
 26 their friends' list from the user's Facebook profile.

28 ¹ Cooper Decl. Ex. 2 at 197:4-8.

1 The undisclosed technology duped users into providing Defendants with total access to
 2 their Facebook user's accounts. [REDACTED]
 3 [REDACTED] [REDACTED]
 4 [REDACTED]
 5 [REDACTED] [REDACTED]
 6 [REDACTED]
 7 [REDACTED]
 8 [REDACTED]⁴ Melling Decl. ¶¶ 3, 17-35. [REDACTED]

9 [REDACTED]. *Id.* ¶ 3; McGeehan
 10 Decl. ¶¶ 8-9. [REDACTED]

11 [REDACTED]
 12 [REDACTED] Melling Decl. ¶¶ 3, 19-23. [REDACTED]
 13 [REDACTED] Cooper Decl. Ex. 2 at
 14 181:21-186:2; 197:9-12; 199:10-15; 203:19-204:7; 205:12-206:22; 207:9-208:14; 212:19-213:4;
 15 256:8-257:10; 257:22-258:11; 259:20-260:1; 261:23-262:5; 263:14-264:12; 266:7-21; 273:6-
 16 274:10; Melling Decl. ¶¶ 21-30. Defendants' promotional "Event" invitations sent to Facebook
 17 users soliciting them to join power.com included the following text, which Vachani conceived
 18 and drafted:

19 [REDACTED]
 20 [REDACTED]
 21 [REDACTED]
 22 *Id.*, ¶ 22. [REDACTED]
 23 [REDACTED]
 24 [REDACTED]
 25

26 ² Cooper Decl. Ex. 6 at Power's Responses to Requests for Admissions Nos. 15, 22; Ex. 2 at
 191:5-192:18.
 27 ³ Cooper Decl. Ex. 6 at Power's Responses to Requests for Admissions Nos. 18, 22, 37; Ex. 2 at
 182:16-186:2; 191:5-192:18.

28 ⁴ Cooper Decl. Ex. 2 at 199:10-15; 203:4-18.

1 [REDACTED] Melling Decl. ¶¶ 3, 19-23.

2 [REDACTED]

3 [REDACTED] These messages read as follows:

4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 _____

8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]

12 [REDACTED]
13 [REDACTED]

14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]

Dkt. Nos. 9 at ¶ 70, 54 at ¶ 70.⁵

18 [REDACTED]
19 [REDACTED].
20 Cooper Decl. Ex.. 2 at 256:8-257:10; 266:7-21; Melling Decl. ¶¶ 21-23. Nowhere in the
21 message, however, is Power identified as the initiator or source of the message. The message
22 offers no vehicle to contact Power and ask for it to stop sending additional messages. Cooper
23 Decl. Ex. 6 at Power's Responses to Requests for Admissions No. 50. Second, the email message
24 itself identifies Power as a "host" of a "reunion event" and provides a time frame for the Event.
25 Dkt. Nos. 9 at ¶ 70, 54 at ¶ 70. Power was "hosting" nothing and the time frame identified for the
26

27 _____
28 5 [REDACTED] Melling
Decl. ¶¶ 3, 19-23.

1 Event was meaningless.

2 [REDACTED] Cooper Decl.

3 [REDACTED] Ex. 2, at 197:9-12; 203:19-204:7; 212:19-213:4; 256:8-257:10; 257:22-258:11; 259:20-260:1;

4 261:23-262:5; 263:14-264:12; 266:7-21; 273:6-274:10; Melling Decl. ¶ 3; McGeehan Decl. ¶¶ 7-

5 9. [REDACTED]

6 [REDACTED]. McGeehan Decl. ¶ 12; Cooper Decl. Ex. 2 at

7 182:16-186:2; 199:10-15. Defendants paid approximately 30 to 40 Power users related to its

8 "Launch Promotion." Cooper Decl. Ex. 2 at 189:5-6. [REDACTED]

9 [REDACTED]. McGeehan Decl. ¶ 7-9.

10 [REDACTED]

11 E. **Defendants Circumvented Technical Measures Designed to Prevent Their**

12 **Attack and Ignored Legal Demands**

13 [REDACTED]

14 [REDACTED] McGeehan Decl. ¶¶ 7-9. [REDACTED]

15 [REDACTED]

16 [REDACTED] *Id.* [REDACTED]

17 [REDACTED]

18 [REDACTED] *Id.* at ¶ 11. Facebook's outside counsel sent

19 Power a cease and desist letter. Cooper Decl. Ex. 6, Power's Responses to Requests for

20 Admissions Nos. 1-10; Ex. 5 at Power's Response to Interrogatory No. 6. Nonetheless,

21 Defendants refused to cease their activities despite repeated promises to do so. Declaration of

22 Joseph Cutler in Support of Facebook's Motion for Partial Summary Judgment ("Cutler Decl."),

23 ¶ 9.

24 [REDACTED]

25 [REDACTED]

26 [REDACTED]. McGeehan Decl. ¶ 13. [REDACTED]

27 [REDACTED]

28 [REDACTED]

1 [REDACTED]. *Id.* ¶ 14. Defendants knew that Facebook could not block these IP addresses without
 2 blocking other, legitimate users on those shared IP spaces. Cooper Decl. Ex. 8. [REDACTED]
 3 [REDACTED]
 4 [REDACTED]

5 Cutler Decl. ¶ 15.

6 **III. ARGUMENT**

7 **A. Summary Judgment Standard.**

8 Under Federal Rule of Civil Procedure 56(c), summary judgment is appropriate if “there
 9 is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a
 10 matter of law.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Once the moving party
 11 demonstrates that there is no genuine issue of material fact, the nonmoving party must designate
 12 “specific facts showing that there is a genuine issue for trial.” *Id.* There is no genuine issue of
 13 material fact if “the evidence [] is of insufficient caliber or quantity to allow a rational finder of
 14 fact” to find for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986).

15 **1. Facebook Was Adversely Affected As A Result Of Defendants’**
 16 **Spamming.**

17 An internet access service provider that is adversely affected under 15 U.S.C. § 7704(b)
 18 may pursue a civil action seeking statutory damages. *See* 15 U.S.C. § 7706(g). Defendants
 19 concede that Facebook is an internet access service provider. Dkt. No. 98 at 13:15-16. In their
 20 Motion for Summary Judgment, they claim that Facebook cannot show it was adversely affected.
Id. at 15-18.

21 Contrary to Defendants’ challenge, this Court already has found that “the undisputed facts
 22 demonstrate that Facebook has suffered some damage or loss attempting to block Power’s access
 23 to the Facebook website.” Dkt. No. 89 at 8. The Court’s prior finding is supported by governing
 24 case law. While “each and every harm that might satisfy the CAN-SPAM Act’s standing
 25 requirement,” has not been enumerated by the statute, “the harms redressible . . . must parallel the
 26 limited private right of action and therefore should reflect those types of harms uniquely
 27 encountered by IAS [Internet Access Service] providers.” *Gordon v. Virtumundo, Inc.*, 575 F.3d
 28

1 1040, 1053 (9th Cir. 2009). Where a plaintiff is an internet access service provider, like
 2 Facebook, “adequate harm might be presumed because any reasonable person would agree that
 3 such entities dedicate considerable resources to and incur significant financial costs in dealing
 4 with the spam.” *Id.* at 1055. Indeed, the “threshold of standing should not pose a high bar for
 5 legitimate service operations . . . [such as] well-recognized ISPs or plainly legitimate Internet
 6 access services providers [like Facebook].” *Id.* See also *Facebook, Inc. v. MaxBounty, Inc.*, 274
 7 F.R.D., 279 at 283-84 (N.D. Cal. 2011) (finding that spam transmissions “require at least some
 8 routing activity on [the] part of Facebook”); *Facebook, Inc. v. ConnectU LLC*, 489 F. Supp. 2d
 9 1087, 1094 (N.D. Cal. 2007) (finding that Facebook was an IAS for purposes of the CAN-SPAM
 10 Act).

11 The undisputed evidence also shows that Facebook has been “adversely affected” under
 12 the CAN-SPAM Act and supports this Court’s previous findings. To establish adverse affects, a
 13 plaintiff need only demonstrate “that the identified concerns are linked in some meaningful way
 14 to unwanted spam and, in turn, represent actual harm. The e-mails at issue in a particular case
 15 must . . . contribute to a larger, collective spam problem that caused ISP-type harms.” *Asis*
 16 *Internet Servs. v. Rausch*, No. 08-03186 EDL, 2010 WL 1838752 at *4 (N.D. Cal. May 3, 2010)
 17 (quoting *Gordon*, 575 F.3d at 1054). Courts have found these harms to include:

- 18 (1) the cost of investing in new equipment to increase capacity and
 customer service personnel to deal with increased subscriber
 complaints;
- 19 (2) maintaining email filtering systems and other anti-spam
 technology on their networks to reduce the deluge of spam; and
- 20 (3) network crashes, higher bandwidth utilization, and increased
 costs for hardware and software upgrades, network expansion, and
 additional personnel.

21 *Asis Internet Servs.* 2010 WL 1838752, at*3. See also *Facebook, Inc. v. Fisher*, No. C09-05842
 22 JF (PSG), 2011 WL 250395, at *3 (N.D. Cal. Jan. 26, 2011) (finding that Facebook established
 23 harm for purposes of the CAN-SPAM Act through a combination of evidence of complaints by
 24 Facebook users, and proof that Facebook “has expended large financial and professional
 25 resources to upgrade its security measures”).
 26
 27
 28

1 [REDACTED]
 2 [REDACTED]
 3 [REDACTED]. McGeehan Decl. ¶¶ 6a-6d.
 4 [REDACTED]
 5 [REDACTED]
 6 [REDACTED]
 7 [REDACTED] (*id.* at ¶¶ 5, 10-11); [REDACTED]
 8 [REDACTED]
 9 [REDACTED] *Id.* ¶¶ 10-11. [REDACTED]
 10 [REDACTED]
 11 [REDACTED].⁶ *Id.*
 12 [REDACTED]
 13 [REDACTED]
 14 [REDACTED]. *Id.* ¶¶ 12-17. [REDACTED]
 15 [REDACTED] *Id.* ¶¶ 13-17.
 16 [REDACTED] *Id.* ¶¶ 17. [REDACTED]
 17 [REDACTED]
 18 [REDACTED] *Id.* ¶ 11; *see also* Cutler Decl. ¶¶ 2-3. [REDACTED]
 19 [REDACTED] Cutler
 20 Decl., ¶ 15.

21 In addition to monetary harm and the diversion of human resources aimed at addressing
 22 Defendants' attacks, Facebook suffered damage to its reputation and goodwill to the extent users
 23 attributed to Facebook an inability to prevent such activity. *See MySpace, Inc. v. Wallace*, 498 F.
 24 Supp. 2d 1293, at 1305 ((C.D. Cal. 2007) irreparable harm proven by the potential for
 25 reputational injury); *Facebook, Inc. v. Wallace*, No. C-09-00798-JF, 2009 WL 840391, at *2
 26 (N.D. Cal. March 24, 2009) (same). Given the content of the messages—including Defendants'

27 6 [REDACTED]
 28 [REDACTED] Cooper Decl.
 Ex. 9 compare with Ex. 6 at Power's Responses to Requests for Admissions Nos. 54-56.

1 failure to identify themselves as the procurers and initiators of the messages—Facebook users
 2 receiving them likely associated Defendants' advertisements with Facebook, thereby harming its
 3 goodwill with its users. Such “[h]arm to business goodwill and reputation is unquantifiable and
 4 considered irreparable. *Myspace, Inc. v. Wallace*, 498 F. Supp. 2d 1293 at 1305; *see also*
 5 *Optinrealbig.com, LLC v. Ironport Sys., Inc.*, 323 F. Supp. 2d 1037, 1050 (N.D. Cal. 2004)
 6 (“Damage to a business’ goodwill is typically an irreparable injury because it is difficult to
 7 calculate.”)

8 **2. Defendants’ Conduct Violated 15 U.S.C 7704(a)(1)(A).**

9 Pursuant to the CAN-SPAM Act, “it is unlawful for any person to initiate the
 10 transmission, to a protected computer, of a commercial electronic mail message . . . that contains,
 11 or is accompanied by, header information that is materially false or materially misleading.”
 12 15 U.S.C. § 7704(a)(1). Here, Defendants initiated at least [REDACTED] that contained
 13 materially misleading header information and failed to disclose that Defendants had paid for their
 14 initiation. Under Section 7704(a)(1), Defendants are liable.

15 a. **Defendants “Initiated” The Transmission Of Electronic Mail**
 16 **Messages.**

17 Defendants initiated the transmission of commercial electronic messages to Facebook
 18 users in violation of the CAN-SPAM Act. 15 U.S.C. § 7704(a); *see also* 15 U.S.C.
 19 § 7704(a)(1)(A). The CAN-SPAM Act defines “initiate,” as:

20 The term “initiate,” when used with respect to a commercial
 21 electronic mail message, means to originate or transmit such
 22 message **or to procure the origination or transmission of such**
 23 **message**, but shall not include actions that constitute routine
 24 conveyance of such message. For purposes of this paragraph, more
 25 than one person may be considered to have initiated a message.

26 15 U.S.C. § 7702(9) (emphasis added). Here, Defendants initiated the transmission of the Event-
 27 related messages when they obtained users’ login credentials, accessed those users’ accounts,
 28 harvested contact information, and used the PowerScript software to create the Events and
 generate the messages. The Facebook users did not create the Events or the content.

27 Additionally, Defendants are liable for initiation for the messages because of the monetary
 28 incentive they offered. their users to recruit Facebook users. “The term ‘procure,’ when used

1 with respect to the initiation of a commercial electronic message, means intentionally to pay or
 2 provide other consideration to, or induce, another person to initiate such a message on one's
 3 behalf." 15 U.S.C. § 7702(12). As this Court recently recognized, a party can "initiate"
 4 commercial email messages for purposes of the CAN-SPAM Act when it induces third parties to
 5 send misleading communications. *See Facebook, Inc. v. MaxBounty, Inc.*, No. 5:10-cv-04712-JF
 6 (HRL), 2011 WL 4346514, at *5 (N.D. Cal. Sep. 14, 2011) (finding CAN-SPAM Act violations
 7 cognizable on allegations that "[defendant] initiated the messages by inducing Facebook users to
 8 execute malicious computer code that causes messages to be sent automatically to all of their
 9 Facebook 'friends'"); *see also* 15 U.S.C. § 7702(12); *see also* *FTC v. Phoenix Avatar, LLC*, No.
 10 04C2897, 2004 U.S. Dist. LEXIS 14717, *39-40 (N.D. Ill., July 30, 2004) (one who "procures
 11 the origination" of offending spam can be liable for "initiating transmission."). Likewise, where
 12 an entity offers to "pay or provide other consideration, or induce, another person to initiate" the
 13 transmission of a commercial message, the entity will be deemed to have procured the
 14 commercial message in violation of the CAN-SPAM Act. *See* 15 U.S.C. § 7702(12); *see* Federal
 15 Register, Vol. 73, No. 99, at p. 29672 (stating that if a seller "'induces' the forwarding of [a]
 16 message—such as by offering payment in exchange for generating traffic to a website—it will be
 17 an 'initiator,' and thus also the 'sender,' of the forwarded message"). Cooper Ex. 10.

18 Power offered its users \$100 in exchange for their successfully inviting Facebook users to
 19 sign up for power.com. *See* Dkt. Nos. 9 at ¶¶ 65, 70, 72; 54 ¶¶ 65, 70, 72. Cooper Ex. 2 at
 20 197:9-12; 203:19-204:7; 212:19-213:4; 256:8-257:10; 257:22-258:11; 259:20-260:1; 261:23-
 21 262:5; 263:14-264:12; 266:7-21; 273:6-274:10. As part of their Launch Promotion, Defendants
 22 presented Power users with a button on the Power.com website which, once clicked, executed the
 23 PowerScript software to automatically create an electronic mail message. *Id.*, at 183:15-184:17.

24 [REDACTED]
 25 [REDACTED]
 26 [REDACTED] Cooper Decl. Ex. 2 at 197:9-12; 203:19-204:7; 212:19-213:4; 256:8-
 27 257:10; 257:22-258:11; 259:20-260:1; 261:23-262:5; 263:14-264:12; 266:7-21; 273:6-274:10;
 28 Melling Decl. ¶¶ 3, 17-24. [REDACTED]

1 [REDACTED]
 2 [REDACTED] Cooper Decl. Ex. 2 at 181:21-186:2; 197:9-12;
 3 203:19-204:7; 205:12-206:22; 207:9-208:14; 212:19-213:4; 256:8-257:10; 257:22-258:11;
 4 259:20-260:1; 261:23-262:5; 263:14-264:12; 266:7-21; 273:6-274:10. [REDACTED]

5 [REDACTED]
 6 [REDACTED]. *See Id.* at 197:9-12; 203:19-204:7; 212:19-213:4; 256:8-257:10;
 7 257:22-258:11; 259:20-260:1; 261:23-262:5; 263:14-264:12; 266:7-21; 273:6-274:10. Power
 8 admits it ultimately paid 30 to 40 Power users. *Id.* at 189:5-6

9 **b. Defendants' Messages Were "Commercial Electronic Mail**
 10 **Messages."**

11 Defendants' messages were commercial. The CAN-SPAM Act defines a "commercial
 12 electronic mail message" as:

13 any electronic mail message the primary purpose of which is the
 14 commercial advertisement or promotion of a commercial product or
 15 service (including content on an Internet website operated for a
 16 commercial purpose).

17 15 U.S.C. § 7702(2)(A); *see also* 16 C.F.R. 316.3(a)(1). Commercial electronic mail messages
 18 include messages "that may not themselves appear commercial, but that promote a 'commercial
 19 service' such as an 'Internet website operated for a commercial purpose.'" 15 U.S.C.
 20 § 7704(a)(5)(A); *see also Myspace, Inc.* 498 F. Supp. 2d 1293, at 1303; *Aitken v. Commc'n's*
 21 *Workers of America*, 496 F. Supp. 2d 653, 662 (E.D. Va. 2007).⁷

22 The communications constitute commercial messages under CAN-SPAM. 15 U.S.C. §
 23 7702(2)(A). First, there can be little dispute that the invitations were electronic mail messages.

24 [REDACTED]
 25 [REDACTED]. Cooper Decl. Ex. 2 at 197:9-12; 203:19-204:7; 212:19-213:4; 256:8-257:10;
 26 257:22-258:11; 259:20-260:1; 261:23-262:5; 263:14-264:12; 266:7-21; 273:6-274:10; McGeehan
 27 Decl. ¶¶8-9; Melling Decl. ¶¶ 3, 17-30. These invitations were sent to a user's friends and

28 ⁷ It is not necessary that the commercial messages be classic emails sent to a user's email address,
 29 as this Court has held that electronic social network messages transmitted to a Facebook user's
 30 "wall," "news feed," "home page," and inbox also are commercial electronic messages for
 purposes of 15 U.S.C. § 7702(2)(A) of the CAN-SPAM Act. *See MaxBounty, Inc.*, 274 F.R.D. at
 282-84.

1 constitute an electronic mail message. 15 U.S.C. § 7702(6). Second, the invitations were purely
 2 commercial in nature. The sole purpose of the messages was to advertise Power.com, a
 3 commercial service. Dkt. No. 54 at ¶ 70.

4 c. Defendants Messages Had Materially False And Misleading
 5 Headers.

6 The headers on Defendants' Event notification messages were materially misleading,
 7 thereby violating the CAN-SPAM Act. The CAN-SPAM Act requires that senders of
 8 commercial electronic mail not mislead recipients as to the source of such messages. 15 U.S.C.
 9 7701(b)(2) and (b)(3). Headers that impair a recipient's ability to identify, locate, or respond to
 10 the person who initiated the message are misleading because they provide no way for a user to
 11 request that the sender stop all future commercial messages. *See Gordon*, 573 F.3d at 1064.
 12 Where, as here, a spammer makes it appear in the header or subject line that the message
 13 originates from a friend, the message appears to have more credibility and therefore is more likely
 14 to trick an objective recipient into believing the message is legitimate. *See Aitken*, 496 F. Supp.
 15 2d at 667 (finding "a message concerning working conditions or benefits at Verizon might have
 16 more credibility coming from a putative Verizon manager than an outsider. Thus, the misleading
 17 header information may have affected an objective recipient's opinion of the value of joining
 18 CWA [the subject matter of the commercial electronic message]").

19 The PowerScript application, through its various methods of causing electronic mail
 20 messages to be sent to Facebook users as part of the Power spam campaign, misleadingly
 21 suggested that the Launch Promotion messages were initiated and sent by Facebook users, when
 22 in fact, Defendants initiated and sent them. Dkt. No. 54 at ¶ 70. [REDACTED]

23 [REDACTED]
 24 [REDACTED]
 25 [REDACTED]. Melling Decl., ¶¶ 3, 17-30; McGeehan Decl.
 26 ¶¶ 8-9, 12. With all three methods, Defendants' automated software inserted misleading
 27 information regarding who initiated the transmission of the messages. Nowhere in the Event

1 creation or invitation process did Defendants say that Power, not the user or Facebook, initiated
 2 the transmission or was paying the user for sending the message. *See* Cooper Decl., Ex. 6 at
 3 Power Venture's Response to Request for Admission No. 50. In fact, the user was not notified at
 4 all as to what Power was doing.

5 **3. Trebling Of Damages Is Warranted**

6 **a. Defendants Knowingly And Willfully Violated The Act**

7 The Court should award treble damages for Defendants' knowing and willful violation of
 8 Section 7704(a)(1). *See* 15 U.S.C. § 7706(g)(3)(A). [REDACTED]

9 [REDACTED]
 10 [REDACTED]. Cooper Decl. Ex. 2 at 181:21-186:2, 197:9-12; 203:19-204:7; 205:12-206:22, 207:9-208:14; 212:19-213:4; 256:8-
 11 257:10; 257:22-258:11; 259:20-260:1; 261:23-262:5; 263:14-264:12; 266:7-21; 273:6-274:10;
 12 Melling Decl. ¶¶ 3, 11, 19. [REDACTED]

13 [REDACTED] McGeehan Decl. ¶¶ 11,13. [REDACTED]
 14 [REDACTED]
 15 [REDACTED]
 16 [REDACTED]. *Id.* ¶¶ 12,13. Indeed, Vachani even warned his coworkers that they should be prepared
 17 for Facebook to block Defendants' efforts. Cooper Decl. Ex. 11. [REDACTED]

18 [REDACTED]
 19 [REDACTED]
 20 [REDACTED] McGeehan Decl. ¶ 14. [REDACTED]
 21 [REDACTED]
 22 [REDACTED] Cooper Decl., Ex. 9. This evidence was
 23 destroyed after litigation commenced.

24 Defendants' violations of the CAN-SPAM Act were knowing and willful, thereby
 25 supporting an award of treble damages. [REDACTED]

26 [REDACTED] While Defendants undoubtedly sent considerably more messages, they have destroyed
 27 the evidence that would show the total number thus further supporting trebling when they had a
 28 duty to preserve. When each known violation of \$100 is trebled Defendants should be liable to

1 Facebook for at least [REDACTED].

2 **b. Defendants' Directory Harvesting Is Also An Aggravated**
 3 **Violation**

4 The Court should award treble damages where, as here, Defendants' unlawful activity
 5 included one or more of the aggravated violations in § 7704(b), such as directory harvesting.
 6 Directory harvesting constitutes an "aggravated violation" where:

7 the electronic mail address of the recipient was obtained using an
 8 automated means from an Internet website or proprietary online
 9 service operated by another person, and such website or online
 10 service included, at the time the address was obtained, a notice
 stating that the operator of such website or online service will not
 give, sell, or otherwise transfer addresses maintained by such
 website or online service to any other party for the purposes of
 initiating, or enabling others to initiate, electronic mail messages[.]

11 15 U.S.C. § 7704(b)(1)(A). In essence, Power was using the credentials of affected users to gain
 12 access to all their friends' contact details and to send unsolicited promotional messages to those
 13 contacts. [REDACTED]

14 [REDACTED]
 15 [REDACTED] Melling Decl. ¶ 19.
 16 [REDACTED]

17 *Id.* [REDACTED]
 18 [REDACTED]
 19 [REDACTED] *Id.* Defendants admit they used the harvested addressing information from Facebook
 20 to send their messages. Cooper Decl. Ex. 6 at Power's Responses to Requests for Admissions
 21 Nos. 15, 18, 22, 37, 43-44, 50, 54-56; Ex. 2 at 182:16-186:2; 191:5-192:18; 197:4-8; 199:10-15;
 22 203:4-18. [REDACTED] (McGeehan Decl. ¶ 7) [REDACTED]

23 [REDACTED] See McGeehan Decl. Ex. 1.

24 Defendants' automatic harvesting of affected users' Facebook friends' user IDs to carry
 25 out Power's spam attack on Facebook is exactly the type of conduct that supports an award of
 26 treble damages.

4. Defendant Vachani Is Independently Liable Under The CAN-SPAM Act.

Vachani is equally liable with his company, Power Ventures. “[A] corporate officer or director is, in general, personally liable for all torts which he authorizes or directs or in which he participates, notwithstanding that he acted as an agent of the corporation and not on his own behalf.” *The Committee for Idaho’s High Desert, Inc. v. Yost*, 92 F.3d 814, 823 (9th Cir. 1996) (quoting *Transgo, Inc. v. Ajac Trans. Parts Corp.*, 768 F.2d 1001, 1021 (9th Cir. 1985)). Nobody disputes that Vachani participated in, authorized and directed Power’s spamming activity. Vachani admits the Launch Promotion was his idea, and that he was responsible for it. Cooper Decl. Ex. 2 at 181:21-183:9; Ex. 5, Power’s Response to Interrogatories Nos. 8-10, 16. Defendants further admit that Vachani is “the Power employee or director responsible for creating the e-mail messages sent to Facebook Users asking Facebook users to use the Power website to access the Facebook website.” *Id.* Ex. 5 at Power’s Response to Interrogatory No. 9. Defendants also admit that Vachani was the “employee or director responsible for developing the technology to allow Power or Power users to access the Facebook website.” *Id.* at Power’s Response to Interrogatory No. 8.

IV. CONCLUSION

For the foregoing reasons, Facebook respectfully requests that the Court grant its Motion for Partial Summary Judgment and find Defendants liable under the CAN-SPAM Act and award damages of \$18,188,100.

Dated: November 18, 2011

ORRICK, HERRINGTON & SUTCLIFFE LLP

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